LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 11 196
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 505

MARIE MILLER AND JEANETTE M. EDELBLUTE,
Petitioners,

v.

EAST GEORGIA MOTORS, INC., A CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

JEFFERIES, MCLEOD, UNGER AND FRASER,
H. WAYNE UNGER,
Counsel for Petitioners.
Jefferies Bldg.,
Walterboro, South Carolina.

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Rules Involved	2
Statement of the Case	3
Reasons for Granting This Writ	8
Argument	9
1. Had the respondent waived any errors of law or fact or findings of the trial Court by its failure to make any motions before the trial Court?	9
2. Did the Court of Appeals have authority to consider an appeal on its merits and to reverse the decision of the trial Court where the sole question involved is the credibility of witnesses?	12
3. Were the trial Court's decision on the credibility of witnesses and its findings of fact clearly erroneous?	14
Conclusion	24
Appendix A	25

Table of Citations

Cases:

American Re-Insurance Corporation v. *Doyle*, 266 F. 2d 574 at 575 (CA 2, 1959)	23
Bruce v. *McClure*, 220 F. 2d 330, 336 (CCA 5, 1955)	20
Fox River Paper Corporation v. *U. S.*, 165 F. 2d 630 (CA 7, 1948)	13
General Freight Transport Company v. *Riss & Company*, 284 . 2d 836 at 842 (CA 7, 1960)	13
Grandin Grain & Seed Co. v. *U. S.*, 170 F. 2d 425 at 428, (CA 8, 1948)	13

	Page
Home Ins. Co. of New York v. *Davila*, 212 F. 2d 731 at 733 (CCA 1, 1954)	12
Hudson v. *Wylie*, 242 F. 2d 435 at 450 (CA 9, 1957)	23
Ira S. Bushey & Sons, Inc. v. *W. E. Hedger & Co., Inc.*, 40 F. 2d 417, 418 (CCA 2, 1930)	19
Irish v. *U. S.*, 225 F. 2d 3 at 8 (CA 9, 1955)	13
In re Duvall, 103 F. 2d 653, 655 (CCA 7, 1939)	22
Maysonet Guzman v. *Ruiz Pichirilo*, 369 U. S. 698, 8 L. Ed. 2nd 205, 82 S. Ct. 1095 (1962)	23
National Labor Relations Board v. *Dinion Coil Co.*, 201 F. 2d 484 at 487 (CCA 2, 1952)	22
Remington Rand, Inc. v. *Societe Internationale Pour Participations Industrielles et Commerciales S. A.*, 188 2d 1011, 1013 (CCA-DC, 1951)	21
Stewart v. *Southern Railroad*, 315 U.S. 283, 62 S. Ct. 616, 86 L. Ed. 849 (1942)	8
U. S. v. *Yellow Cab Co.*, 70 S. Ct. 177 at 179, 338 U. S. 338, 94 L. Ed. 150 (1949)	23
United States v. *Mountain State Fabricating Co.*, 282 F. 2nd. 263 (CCA 4, 1960)	9

MISCELLANEOUS

28 U.S.C.A., Section 1254 (1)	2
Rule 52 of the Rules of Civil Procedure	2
Rules 12 or 56	3
Rule 41(b)	3
Rule 59	3
31 Corpus Juris Secundum, pages 1164, 1166, 1167, 1168	17
31 Corpus Juris Secundum, page 1015	17
31 Corpus Juris Secundum, pages 1180, 1181	17
31 Corpus Juris Secundum, page 1017	19
3 Am. Jur. Appeal & Error, § 896	20
Rule 52(a)	21
Fed. R. Civ. P. 52(a)	21
Federal Rule 50(b)	10, 11
Federal Civil Procedural Rules, 28 U.S.C.A.	23

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No.

MARIE MILLER AND JEANETTE M. EDELBLUTE,
Petitioners,

v.

EAST GEORGIA MOTORS, INC., A CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Marie Miller and Jeanette M. Edelblute, the petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on 22 June 1962.

Opinion Below

The opinion of the Circuit Court of Appeals for the Fourth Circuit is reported at 303 F. 2d 488 *et. seq.* The judgment of the Circuit Court of Appeals is printed in Appendix A hereto at Page 25. The judgment of the United States District Court for the Eastern District of

South Carolina, dated 26 June 1962, is printed in Appendix A hereto at Page 34. The Order of the United States District Court for the Eastern District of South Carolina, dated 1 September 1961, is printed in Appendix A hereto at Page 35.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on 22 June 1962. The jurisdiction of the Court is invoked under 28 U.S.C.A., Section 1254 (1).

Questions Presented

The following questions are presented for review:

1. Had the respondent waived any errors of law or fact or findings of the trial Court by its failure to make any motions before the trial Court?

2. Did the Court of Appeals have authority to consider an appeal on its merits and to reverse the decision of the trial Court where the sole question involved is the credibility of witnesses?

3. Were the trial Court's decision on the credibility of witnesses and its findings of fact clearly erroneous?

4. Should the Court of Appeals have directed that judgment be entered for respondent instead of merely ordering a new trial?

Rules Involved

This appeal involves Rule 52 of the Rules of Civil Procedure for the United States District Courts, which provides:

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law

thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

Statement of the Case

This review involves two actions brought originally in the Court of Common Pleas for Colleton County, South Carolina, for personal injuries arising from a vehicular upset. The actions were removed by the respondent to the United States District Court for the Eastern District

of South Carolina upon the ground of diversity of citizenship. Respondent then served a general denial in each case, later serving an amended Answer in the *Marie Miller* case adding the defenses of assumption of risk and contributory negligence by Mrs. Miller.

Petitioners made belated demands for jury trials, which were opposed by respondents and refused by the Court. The actual trial was delayed many years because of the petitioners' physical and mental condition. The actions were consolidated for trial before Judge C. C. Wyche, without a jury, on 19, 20 and 21 July 1961. Judge Wyche thereafter filed his Order of 1 September 1961 awarding damages in the amount of $25,000.00 to Marie Miller and $37,500.00 to Jeanette M. Edelblute.

Both Complaints alleged that the petitioner, Mrs. Marie Miller, secured an automobile from the respondent in Savannah, Georgia, in April 1955, for demonstration purposes to determine whether or not she would purchase the car; that she and petitioner, Jeanette M. Edelblute, were passengers in that automobile in Colleton County, South Carolina, returning to Savannah, when it was caused to go off the road by a defect in the brakes which was known or should have been known by the respondent and that their injuries and damages resulted from the respondent's negligence in not ascertaining the defect or in not repairing the defect of which they knew and which rendered the automobile a dangerous instrumentality. Respondent denied these allegations. Notwithstanding respondent's denial, its witnesses admitted at the trial that Mrs. Miller did get the automobile from them for demonstration purposes, although it denied there was any defect or that it had knowledge of any such defect or could have had knowledge of such defect but on the other hand neither the respondent nor its witnesses had any explanation what-

soever in any of their testimony for the cause of the accident. The substance of their testimony, including the driver of the vehicle (even though he was the stepfather of Marie Miller), was to the effect that nothing caused the accident—it just happened.

The testimony of respondent's witness, Mr. Laird, driver of the automobile, was to the effect he was not asleep; the road was straight; the pavement was dry; and there were no holes or bumps in the road; there was no other vehicle on the road; he did not apply brakes; he did not turn off the highway and he doesn't know what happened. The respondent's witness testified when they took in a used car, as a matter of usual rule, they checked everything, including the brakes, but no one testified for the respondent that this vehicle was checked; however, a salesman did state that he had driven it and it was all right. The respondent had no explanation whatsoever for any cause of the vehicle leaving the highway which left the plain, logical, certain inference that something caused the vehicle to leave the highway, other than the negligence of the driver.

The petitioners on the other hand, at the trial, both testified that they were awake and aware of what was happening; that the driver was overtaking an automobile and in applying the brakes something grabbed; the vehicle was taken out of control of the driver, thrown to the left side of the highway where he controlled it down the shoulders for a while until there was another sudden grab pulling the car off the shoulder into a tree where it stopped. The petitioners further testified that the vehicle was giving difficulty before they left Savannah, Georgia, and they returned it to the respondent's place of business for examination and that the respondent's agents undertook to

examine it and returned it with the statement it was all right, and it was right until the wreck.

The petitioners' witness, Mr. E. Y. Berry, testified that he was the Service Manager for the Ford Dealer at Walterboro, South Carolina; that he had gone to the scene of the accident and assisted in removing the vehicle and that it was brought to his shop in Walterboro about one week later. He testified as to the facts within his observance, of oil or grease on the left-hand brake; that this wheel was frozen, due to internal locking and not from the force of the collision. He testified in his opinion, as an expert, the cause of the vehicle leaving the highway was the locking of that left front wheel by the presence of oil or grease on the brake lining but he did not need to remove the wheel to arrive at that expert opinion. He further testified that when used cars were brought to him with complaints of pulling from one side or the other, as Mrs. Miller complained to the respondent, that he would have to remove both wheels in order to inspect the vehicle properly and to determine the trouble in order to repair it and that this would take about two hours. The petitioners testified that when they carried the car back to respondent, the respondent's agents took it to the shop but returned it within fifteen minutes, representing it to be all right.

Aside from the statement of respondent's salesman that he had driven the car, the respondent's witnesses denied it had ever been returned for examination. The only testimony or evidence on the part of the respondent concerning this wheel, defective brake or oil or grease was by the respondent's witness, David Purcell. He claimed to have examined an automobile which he had been told was the wrecked car where he found it in a junk yard in Savannah, Ga., approximately three months after the wreck. Although he had no date on his report, he was specifically instructed

to check the brakes in July of 1955, according to his recollection. He stated the wheel was locked but they pulled the bumpor loose and freed it. He further testified that he removed the wheel and it had no grease or sand or greasy substance on it. This raises the inference he did not examine the same vehicle as did Mr. Berry who saw it in the ditch and had it at his place of business shortly after the wreck when the wheel was frozen from inside and did have grease and oil.

The defense relied almost entirely on two alleged doubtful documents, claimed to be statements by Mrs. Miller and Miss Edelblute, taken while they were suffering from terrible injuries, under narcotics or sedation and in shock and mental confusion and without any opportunity to have their counsel present. Both these statements were taken by the respondent's agents and both contained suggestive references that each petitioner was asleep and did not really know what happened. These statements used by the respondent in the attempt to impeach the oral testimony or credibility of the petitioners were really the sole defense and the sum and substance of the testimony of the respondent.

The Court of Appeals viewed these extrajudicial statements as "thoroughly discrediting" petitioners' court room testimony, speculated as to what uncalled witness might have testified, substituted its judgment for that of the trial Court who heard the testimony on the stand and observed the witnesses' demeanor, seems to have tried the case de novo on the parts of the record before them and on what uncalled witnesses might have stated had they been called, and remanded the case with directions that judgment be entered for the respondent.

Reasons for Granting This Writ

A writ of certiorari should be granted because the action of the Court of Appeals is such a far departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision and because the same is in conflict with the decision of this Court in the case of *Stewart* v. *Southern Railroad*, 315 U.S. 283, 62 S.Ct. 616, 86 L. Ed. 849 (1942).

4. *Should the Court of Appeals have directed that judgment be entered for respondent instead of merely ordering a new trial?*

Even if the Court of Appeals were correct in its conclusion that the judgment of the District Court should not be allowed to stand, petitioners contend that the cause should have been remanded for a new trial.

Stewart v. *Southern Railroad*, 315 U.S. 283, 62 S. Ct. 616, 86 L. Ed. 849 (1942), was an action for the death of a train crewman. Plaintiff received a verdict below, but the Circuit Court of Appeals held there was no substantial evidence to sustain the verdict and reversed and remanded the case with directions to enter a judgment for the railroad. Plaintiff had called as a witness the foreman of the crew, but he was not asked about the working condition of the pin lifter or coupler in question nor what effort he made to operate the same.

This Court said (62 S. Ct. at 617, 618)

> "If the issue as to the condition of the coupler mechanism was determinative, a new trial should have been ordered so that this issue might have been resolved in the light of a full examination of the foreman, the witness who could have given further testimony on the subject.

"The judgment must be reversed and the cause remanded to the court below for further proceedings."

In the instant case the Court of Appeals gave as a reason for reversal "the failure of the plaintiffs to call Mrs. Laird and Mrs. Richardson to corroborate their very different trial version of the facts." If this was determinative, a new trial should have been ordered so that this failure might be explained, or one or both of the possible corroborating witnesses called.

ARGUMENT

1. Had the respondent waived any errors of law or fact or findings of the trial Court by its failure to make any motions before the trial Court?

The respondent failed to move for a dismissal at the end of petitioners' case. It made no motion for a directed verdict or for judgment for defendant. No motion for a new trial, for judgment notwithstanding the verdict, nor to amend the factual findings of the trial judge were made. The District Court was given no opportunity to review, modify or correct any possible error which he may have made.

That failure to make motions below was tantamount to a waiver or an abandonment was pointed out by Chief Judge Sobeloff in his opinion in *United States* v. *Mountain State Fabricating Co.*, 282 F. 2nd. 263 (CCA 4, 1960). There the Government sued for destruction by fire of its stored crude rubber. Although that case was tried before a jury which resulted in a verdict for defendants, the Government made no motion for directed verdict nor motion for new trial and no motion for judgment notwithstanding the verdict. Nevertheless, the Government appealed from

the verdict and judgment and the learned Chief Judge Sobeloff said (282 F. 2nd. at page 265)

> "We agree with the defendants that the Government's failure to file a motion for a directed verdict or a motion for judgment n.o.v. precludes an examination of the record to determine on this appeal whether the United States was entitled to such directed verdict or judgment. * * * The Government limits its appeal to the alleged errors of the District Court in excluding, over objection, certain evidence and in denying certain requested instructions to the jury. Such claims of error, we hold, may be examined on this appeal, notwithstanding the plaintiff's failure to file motions for directed verdict, for new trial and for judgment n.o.v. The better practice, however, would have been to have filed such motion and thus have permitted review thereof by the trial court."

Neither the Court of Appeals nor the District Court can enter judgment for the respondent on the whole record, because no motion was made at the end of the testimony at the trial court below nor was any motion for judgment for defendant made within ten days in the court below on grounds for which verdict and judgment for the defendant could be entered by either the lower court or the Court of Appeals.

> "In order to enable a trial court to enter, or an appellate Court to direct, a judgment under Federal Rule 50(b) or like state provisions, a party must take the following steps: (1) after the close of all the evidence the party must move for a directed verdict, such a motion being necessary, even though the party has made a motion for a directed verdict after the close of the evidence introduced by the adversary party; (2) within 10 days

after reception of the verdict or the discharge of the jury he must move for judgment under the rule. It is advisable to couch this motion in the exact language used in the rule; a motion for a new trial is not sufficient."

"Where the prerequisites stated above have not been met, a court has no power to render judgment under the rule."

(69 A.L.R. 2d 476, 477).

"Federal Rule 50(b) provides that within 10 days after the reception of a verdict, a party who has moved for a directed verdict 'may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict,' or if a verdict was not returned, such party may move for judgment in accordance with his motion for a directed verdict."

"Under Federal Rule 50(b) and like state provisions, a party's timely postverdict motion for judgment under the rule is an indispensable prerequisite of the granting of such a judgment by a trial court, or, at least in so far as questions bearing upon the evidential support of a claim or defense are concerned, of the direction of such a judgment by an appellate court."

"A party who makes a motion to set aside the verdict and for a new trial but fails to move for judgment as required by the rule may obtain only a new trial."

(69 A.L.R. 2d 491).

"Under Federal Rule 50(b) and like state provisions an appellate court has, in the absence of a motion for judgment under the rule seasonably made in the trial

court, no power to direct the trial court to enter such a judgment."

(69 A.L.R. 2d 493).

"In the instant case, defendants made no motion for a directed verdict at the close of all the evidence, under Rule 50(b); nor did they, after the jury had returned its verdict for the plaintiff, move for judgment notwithstanding the verdict. In the present posture of the case, even though we thought that the evidence was not sufficient to sustain the jury's verdict, we could not upon remand, direct, the district court to vacate the judgment for the plaintiff and enter judgment for the defendants notwithstanding the verdict. See Cone v. West Virginia Pulp & Paper Co., 1947 330 U.S. 212, 67 S. Ct. 752, 91 L. Ed. 849; Glove Liquor Co., Inc. vs. San Roman, 1948, 332 U.S. 571, 68 S. Ct. 246, 92 L. Ed. 177; Johnson v. New York, N. H. & H. R. Co., 1952, 344 U.S. 48, 73 S.Ct. 125, 97 L. Ed. 77. We could, of course, reverse for errors in admission or exclusion of evidence, or errors in instructions to the jury; but in that event the case would have to be remanded for a new trial or other proceedings not inconsistent with our opinion."

Home Ins. Co. of New York v. *Davila*, 212 F. 2d 731 at 733 (CCA 1, 1954).

2. Did the Court of Appeals have authority to consider an appeal on its merits and to reverse the decision of the trial Court where the sole question involved is the credibility of witnesses?

The respondent complained, in the Court of Appeals, that plaintiffs' testimony was not worthy of belief. It desired the appellate court to weigh the evidence, to sift

the testimony and to consider and adjudge the credibility of witnesses. Such is beyond the authority of the Court of Appeals.

> "It must be remembered that, upon review of a judgment in a non-jury case, the prevailing party is entitled to have the evidence viewed in the light most favorable to it . . ."
>
> *Grandin Grain & Seed Co.* v. *U. S.*, 170 F. 2d 425 at 428, (CA 8, 1948)
>
> "This court is not the trier of the facts, nor does it substitute its own judgment for that of the trial court."
>
> *Irish* v. *U. S.*, 225 F. 2d 3 at 8 (CA 9, 1955)
>
> "This court is not called upon to place itself in the shoes of the trial court, weigh the evidence, draw reasonable inferences, make findings, and determine the result."
>
> *General Freight Transport Company* v. *Riss & Company*, 284 F. 2d 836 at 842 (CA 7, 1960).

In Fox River Paper Corporation v. *U. S.*, 165 F. 2d 639 (CA 7, 1948) the District Court made factual findings as to value. In affirming, the Court said:

> (165 F. 2d at 640)
>
> "We consider only the evidence that supports the Court's finding. We do not weigh the evidence or resolve any conflicts therein, *or consider here the credibility of the witnesses.*"
>
> (Emphasis added.)

3. Were the trial Court's decision on the credibility of witnesses and its findings of fact clearly erroneous?

The Court of Appeals has viewed the pretrial statements of petitioners as being true, has called petitioners' court room testimony a bold contradiction of the pretrial statements, and concluded that judgments, based on such "thoroughly discredited testimony," are "clearly erroneous" and cannot stand. The trial judge, who had the opportunity to observe not only petitioners when they testified, but also the demeanor of those whose testimony formed the basis for the introduction of the pretrial statements, rejected the pretrial statements. In view of petitioners' physical and mental condition at the time that the pretrial statements were taken and of the fact that their counsel were not present, it seems clear that respondent's conduct in taking the statements was somewhat overreaching. If these ladies, especially Miss Edelblute, had executed wills under similar circumstances, a will contest could have arisen. Respondent, in an effort to avoid liability, endeavored to have Mrs. Miller sign papers in the Colleton County Hospital making out a purchase of the automobile by her. Is it unreasonable to believe that respondent also "put petitioners to sleep" in the pretrial statements in order to avoid liability? That petitioners were asleep is the only thing *in* the statements which really prejudice their theory of the case, although the Court of Appeals was impressed with what was *omitted* from the statements. Mrs. Miller's statement points out that the brakes were defective. It does not elaborate on this; but then no one was questioning her so as to advocate her side of the case. And the scrivener of the Edelblute statement was not a proponent of her version of the occurence.

In addition to judging these statements and the testi-

mony taken at the trial, which it did not hear first hand, the Court of Appeals also passed on the credibility of testimony which neither the District Court nor it heard! It leans heavily upon what Mrs. Richardson and especially what Mrs. Laird would have said. It cites petitioners' failure to call these witnesses as supporting the veracity of the pretrial version of what happened. Petitioners' counsel never heard of the pretrial statements until the trial. Why should they go to the expense of having Mrs. Laird and Mrs. Richardson present to testify cumulatively to what petitioners would assert? When the pretrial statements were offered, it was too late to have these ladies in court. It is the absence of this "available corroboration," claimed the Court of Appeals, which caused the trial judge to fall into plain error in making findings of fact consistent with petitioners trial version. The record does not show that this testimony was "available." Why didn't respondent examine Mrs. Richardson, if, as the Court of Appeals suggests, her testimony would back up the pretrial version of the happening?

The Court of Appeals was overawed with Mrs. Laird's testimony ond concluded it was true because contrary to his financial interest in a recovery for himself and his spouse. The record does not show whether respondent has paid Mr. Laird—or Mrs. Laird too, for that matter—and taken their general release. Or perhaps Mr. Laird and respondent had the same insurer whose common interest was in showing that the brakes were not defective and that Mr. Laird admitted no fault in his operation of the vehicle.

The Edelblute statement is a three and one-half page, longhand document and was allegedly obtained on 23 June 1955. The alleged statement is not witnessed, sworn to, nor notarized. Ralph E. Rock, a claim supervisor for

Liberty Mutual Insurance Company, testified that he procured the statement although his name does not appear thereon. He testified that he slipped into the Altoona, Pennsylvania Hospital to Miss Edelblute's room, found her in bed, alone in a hospital room, with her right leg in traction, that he was with her an hour or two, took the alleged statement but did not give Miss Edelblute a copy of it, in keeping with the custom of his insurance company, employer.

Miss Edelblute testified that she shared the Altoona Hospital room with a Mrs. Wilson who was paralized from the waist down and who had a private duty nurse. She testified that her mother (since deceased) was her constant companion. It is strange that Mr. Rock, during his hour or two visit, did not see any of these persons. Miss Edelblute related that the hospital required visitor's passes but that her condition made it out of the question for her to receive visitors. Mr. Rock stated that a visitor's pass was unnecessary. Miss Edelblute told the Court that she suffered day long blackouts on account of her cerebral concussion and was under deep sedation. She further related that wires had been removed from her jaws on 14 June 1955 and that she could not talk until mid-July and then only with a more or less unintelligible mumble or lisp.

Miss Edelblute's injuries—(and appellant has made no attempt to minimize the dreadful injuries which this young lady suffered) were such that the absence of visitors, the presence of her mother, the blackouts, the sedation and the speech difficulty are most plausible.

Even if the trier of the fact believed that Miss Edelblute signed the statement in question, the circumstances under which the statement was procured, render its evidenciary value weak indeed. Miss Edelblute, corroborated by Mrs. Miller, has testified to facts different from the statement.

She denied the truth of the matters allegedly written down in the statement by Mr. Rock. She says she did not tell Mr. Rock those things. She questions her signature to the statement. The trial judge has weighed this bit of defendant's evidence and found it wanting. This was proper.

> ". . . an extrajudicial admission is not conclusive on the party making it or to whom it is attributable, where testimony to the contrary . . . appears . . .
>
> "The party against whom an alleged admission is shown may introduce evidence to . . . contradict or prove the falsity thereof, whether written or oral. He may show the circumstances under which the statement was made . . ."
>
> (31 Corpus Juris Secundum, pages 1164, 1166, 1167, 1168).

No reasonable mind can accept that this girl in her condition spent two hours reciting the details in this alleged statement, including the injuries of others in the car and that she suffered $13 property damages. Fiddlesticks!

> "It may be stated, as a general rule, that evidence of unsworn statements admitted under the various exceptions to the hearsay rule . . . is regarded as weak evidence which should be received with caution."
>
> (31 Corpus Juris Secundum, page 1015).
>
> "An admission is to be considered and weighed like other evidence, to be considered in the light of the other evidence in the case, the ultimate determination as to value, effect, or weight thereof being for triers of the facts."
>
> (31 Corpus Juris Decundum, pages 1180, 1181).

Appellant sought to discredit the court room testimony of Marie Miller by the testimony of its witness, Theodore B. Heriot. From appellant's case it appeared that, on 17 June 1955, Mr. Frank Akrey carried a Mr. Heriot, a Commissioner under Georgia law with power to subpoena witnesses, to the home of Mrs. Miller allegedly to take a statement, all without benefit of counsel for Mrs. Miller. According to Mr. Heriot, questions were asked of Mrs. Miller by a Frank Akrey, an employee of Liberty Mutual Insurance Company, who did not testify at the trial. Mr. Heriot said that he recorded these questions and answers with a recording machine, did not take any shorthand notes, and later wrote them down from listening to the recording. This unsigned document, introduced in evidence, does not reveal the name of the questioner.

Mr. Heriot experienced great difficulty in recalling the physical surroundings where the statement was taken. He said he did a great deal of work for Akrey's Insurance Company. In the preamble to the Exhibit Heriot certified "that I am an interested party" although he sought to explain this as being a clerical error. Heriot admitted that there were certain questions and answers which he regarded as asides and which he did not transcribe. He also admitted that he had done a great deal of adding to the recording (he refused to call this "editing") for the sake of clarity. He also said there were certain sounds which his recording equipment failed to record. Heriot at first described Mrs. Miller as normal and natural throughout the questioning and stated that she then looked as she looked in court, except that previously she was younger. He finally confessed that Mrs. Miller was horribly scarred, that she cried at least twice during the questioning, that she seemed to be under a doctor's care (this was only two months after the wreck), and related that she was under-

going a series of operations. He said that she was emotionally upset, that she lost her self control and that she broke down.

From appellant's witness it appeared that the Exhibit is the statement of a sick, distressed, badgered woman. Mrs. Miller said she did not recall making the statement attributed to her.

> "A person's memory of his own utterances is regarded as more authentic than that of a listener."
>
> (31 Corpus Juris Secudum, page 1017).

We point out that in both alleged statements of the petitioners some clear thinking mind suggested that both these girls were asleep and did not know what happened. What an insidious psychological suggestion to be made to two hurt minds looking to blot out the horrors of the wreck.

The alleged statement of Mrs. Miller does not bind her. Its probative value is for the trier of the fact. He can find it nugatory and of no weight.

> "An admission, except when formally made at trial, even if by a party in propria persona, is at most only evidentiary matter which may be rendered nugatory by other evidence in the case."
>
> (*Ira S. Bushey & Sons, Inc.* v. *W. E. Hedger & Co., Inc.*, 40 F. 2d 417, 418 (CCA 2, 1930).)
>
> "Formerly, the view prevailed that admissions had the function only of impeaching a party by prior inconsistent statements, . . . but it is generally accepted today that admissions are affirmative evidence . . . The New York Court of Appeals, in Gangi v. Fradus, 227 N. Y., 452, 457, 125 N. E. 677, 679, sets forth

persuasively the considerations which ought to justify giving great weight, or none at all, to admissions:

'. . . The jury shall determine whether or not they were made; if made, the conditions and circumstances under which they were made and the effect thereof, and their probative weight and value, which may range from the lowest, or none at all, to conclusiveness.' "

(*Bruce* v. *McClure*, 220 F. 2d 330, 336 (CCA 5, 1955).)

The advantage which the trial judge had to observe the demeanor of the witness in court has long been cited in sustaining his factual findings.

"The principle found in a statement that the findings of a trial court which has had the advantage of seeing and hearing the witnesses are entitled to great weight is so universally recognized that an exhaustive citation or analysis of the cases supporting it would not be practicable. Hence the comment character of this annotation.

"In 3 Am. Jur. Appeal & Error, § 896, it is said that the trial court is naturally in a better position to pass on the credibility of the witnesses, and that the appellate court will not, in fact, generally speaking, cannot, set itself up as a judge of the credibility of witnesses or weigh the evidence, even though a preponderance of it against the finding or verdict is apparent. The text continues: 'The question of credibility of witnesses and the weight to be given their testimony is exclusively within the province of the trial court; the province of the appellate court is to determine whether there is any evidence from which the trial court might properly have drawn its conclusion. As has been pointed out, discrepancies are more likely to appear in the record

of the testimony of a candid witness than in that of an astute perjurer. These considerations have led the appellate courts to deal with findings of fact made by the trial judge, especially among oral testimony of witnesses, where he has had full opportunity to observe the demeanor of the witnesses and judge their veracity, in much the same manner as they would with the verdict of a jury, according to such findings the same conclusiveness and binding effect, or the same weight, as a verdict of the jury would have been accorded had one been rendered.' "

(111 A.L.R. 742).

Indeed Rule 52(a), states that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witness."

"Where a trial involves disputed factual issues a choice must always be made between opposing versions of the evidence. In this case the law imposed that high duty and responsibility upon the presiding judge. His preferred opportunity for just appraisement of the witnesses and fair comparison and evaluation of the evidence is recognized in the law's command that 'Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses'. Fed. R. Civ. P. 52(a)."

(*Remington Rand, Inc.*, v. *Societe Internationale Pour Participations Industrielles et Commerciales S. A.*, 188 2d 1011, 1013 (CCA DC, 1951).)

A witness' physical appearance and conduct speaks. The tone of his voice, his embarrassment and nervousness, his facial expressions, his hesitation or readiness to answer

impress the listener; but do not appear in the written record. His look, composure, carriage, zeal, bearing, surprise, gestures, yawns, the use of his eyes, shrugs, self-possession, glances and his air of candor or seeming levity all tell something of his truthfulness and are seen by the trial court alone.

The language used by the Court *In re Duvall*, 103 F. 2d 653, 655 (CCA 7, 1939), is pertinent to this appeal. The Court said:

> "The argument presented here indicates that counsel, erroneously, we think, have assumed that this is a trial de novo. Ordinarily, this court sits merely in the capacity of review and is bound by the findings of the lower court where the same is supported by substantial evidence, notwithstanding the fact that we might have reached a different conclusion on a matter submitted to us as an original proposition. This situation, applicable to reviewing courts generally, is due to the long recognized fact that the court who has seen and heard the testimony of witnesses is in a better position to judge of their credibility and the weight to be attached to their testimony than is a reviewing court with nothing before it but the printed record."

National Labor Relations Board v. *Dinion Coil Co.*, 201 F. 2d 484 at 487 (CCA 2, 1952).

> "If, in similar circumstances, a trial judge made such a finding, we would be obliged to accept it. For the pivotal factor here is the Examiner's disbelief in Holland's testimony, a disbelief that rested on an evaluation of Holland's credibility, which in turn the Examiner founded upon 'his observation of the witnesses.' Repeatedly, the courts have said that, since observation of such 'demeanor evidence' is open to a trier of

> the facts when witnesses testify orally in his presence, and since such observation is not open to a reviewing tribunal, that fact-trier's findings, to the extent that they comprise direct or 'testimonial' inferences, are ordinarily unreviewable. True, demeanor evidence may sometimes mislead; but our courts regard it nevertheless as an excellent clue to the trustworthiness of testimony. The Federal Civil Procedural Rules, 28 U.S.C.A., reflect this view."

The trial Court had to believe one version of the factual dispute and reject the opposing view. As this Court has declared:

> "Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous.'"
>
> *U. S.* v. *Yellow Cab Co.*, 70 S. Ct. 177 at 179, 338 U. S. 338, 94 L. Ed. 150 (1949).
>
> "In law cases the findings of fact of the lower court are equivalent to the verdict of a jury and will be disturbed on appeal only when shown to be clearly erroneous."
>
> *Hudson* v. *Wylie*, 242 F. 2d 435 at 450 (CA 9, 1957).
>
> "This finding turned upon the credibility of witnesses who were seen by the District Judge and we extensively cross-examined. His acceptance of the testimony and memoranda of Mr. Ruddy in preference to the testimony and memorandum of Mr. Wise we cannot hold to be 'clearly erroneous.'"
>
> *American Re-Insurance Corporation* v. *Doyle*, 266 F. 2d 574 at 575 (CA 2, 1959).

Maysonet Guzman v. *Ruiz Pichirilo*, 369 U. S. 698, 8 L. Ed. 2nd 205, 82 S. Ct. 1095 (1962) was a suit in admiralty

by a longshoreman to recover damages for personal injuries resulting from the unseaworthy condition of the ship. The defense was that the ship had been demised to another. The District Court found that there was no demise and awarded judgment for $30,000.00. In finding that there was no demise, the trial Court rejected the testimony of the owner. The Court of Appeals reversed the judgment. This Court reinstated the longshoreman's judgment. It said (82 S. Ct. 1098)

> "A refusal to credit the uncorroborated testimony of the director-partner, who obviously was not disinterested in the outcome of the litigation, would not be clearly erroneous. . . . *A fortiori* the refusal to accept such testimony, disputed as it was by the testimony of the Captain, cannot be considered clearly erroneous."

In the instant case the District Court rejected the testimony of Mr. Rock (an employee of the defendant's insurer) and of Mr. Heriot (who had been employed by the defendant's insurer) as to the authenticity of the alleged statements. Such is not "clearly erroneous."

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

JEFFERIES, MCLEOD, UNGER AND FRASER,
H. WAYNE UNGER,
Counsel for Petitioners.
Jefferies Bldg.,
Walterboro, South Carolina.

17 September 1962.

APPENDIX A

JUDGMENT OF THE CIRCUIT COURT OF APPEALS

PER CURIAM:

In these two actions for damages for personal injuries, suffered when the automobile in which they were passengers ran off the highway, the District Court accepted the plaintiffs' testimonial version of the facts upon which they sought to establish the liability of the defendant, though their testimonial version of those facts was contradicted by the prior recorded statements of the plaintiffs themselves, by the pretrial deposition of the driver of the automobile, the father of one of the plaintiffs, and was uncorroborated by the other passenger in the vehicle, the wife of the driver and mother of one of the plaintiffs. We think the general findings of the District Court based upon the thoroughly discredited testimony of the plaintiffs, were clearly erroneous, and that the judgment based upon those findings cannot stand.

At the trial, the plaintiffs sought to establish that they had obtained a used car from a dealer in Savannah, Georgia, that one of them was considering purchasing the automobile, and, with the permission of the dealer, they went on a trip of substantial length into South Carolina. They testified that the accident was caused by a defective brake, notice of which they had earlier brought home to the defendant. The brake, they said, caused the left front wheel to lock, with the result that the driver lost control of the vehicle, so that it ran off the left hand side of the road and crashed into a stump.

In their recorded statements, made several years before the trial and within a few months after the accident, they said they had no idea what caused the accident, for each was asleep at the time. They had not notified the defendant of any defect in the brakes and they did not even claim that they had obtained permission of the defendant to take the defendant's automobile on the journey. Moreover, the driver of the car, who was, himself, injured in the accident,

testified in his pretrial deposition that there was no indication of any defect in the brakes, that he was not attempting to apply them at the time (contrary to the trial testimony of the plaintiffs), and that he did not know what caused him to lose control of the vehicle.[1]

The plaintiff, Florence Marie Miller, had been working at Hunter Air Force Base near Savannah, Georgia. At the conclusion of a visit to her home in Altoona, Pennsylvania, her mother and father,[2] Mr. and Mrs. Earl S. Laird, undertook to drive her in the father's automobile from Altoona to Savannah. They left Altoona late in the evening on May 17, 1955. They traveled the remainder of that night and most of the next day. They had trouble with the car in North Carolina, which the father attempted to repair. They then resumed their journey. Sometime during the night of May 18-19, at a point north of Walterboro, South Carolina, further serious engine trouble developed, and they could proceed no farther. They slept in the car through the remaining hours of that night, and, on the morning of May 19, 1955, Mrs. Miller and her mother each "hitchhiked" the remainder of their way to Savannah. The father, employing the same mode of travel, followed later.

According to her pretrial statement, during the afternoon or evening of May 19, 1955, after her arrival in Savannah, Mrs. Miller went to a used car lot operated by the defendant where she expressed interest in the purchase of an automobile. She was given permission to try and test a 1950 model Ford and to retain possession of it

[1] As will presently appear, three of the occupants of the vehicle, including the driver, had had little, if any, sleep for three nights. The accident occurred in the early morning hours of the third night. In her pretrial statement, each of the plaintiffs said she was asleep at the time. Mrs. Miller said she turned the driving over to her father because she was so tired and sleepy, she felt it unsafe for her to drive. The driver testified that all other occupants of the car were asleep at the time, and it is a reasonable probability that he, too, fell asleep.

[2] Mr. Laird is actually her stepfather. In a pretrial statement and in her testimony, Mrs. Miller explained the relationship, but, otherwise, consistently referred to him simply as her father. We, conscious of the actual relationship, for convenience, adopt her method of referring to him.

until the afternoon of the 20th after she completed her day's work at Hunter Air Force Base. She told the defendant's salesman of the breakdown of her father's automobile in explanation of her purchase of another vehicle, but she would not say that she had told him of her purpose to use the borrowed vehicle to make a round trip of more than two hundred miles to retrieve some tools her father had left in his abandoned automobile.

After driving to her residence in Savannah Beach, Mrs. Miller, her mother and father and Miss Edelblute,[3] the other plaintiff, decided that they would drive in the borrowed automobile to the point where Mr. Laird's automobile had been left north of Walterboro, South Carolina, for the purpose of picking up some tools which Mr. Laird had left in his locked automobile. With Mrs. Miller driving the borrowed vehicle, they left Savannah Beach in the early evening and drove through Savannah, Georgia and on to Walterboro, South Carolina and beyond, where they picked up Mr. Laird's tools and made an effort to tow Mr. Laird's car. Abandoning the towing effort, they set about on their return journey. After driving through Walterboro, Mrs. Miller surrendered the role of driver to her father. She did so, she said, because she was so tired and sleepy she felt it unsafe for her to continue. She had to work the next day and wished to get some sleep.

In her pretrial statement, taken in question and answer form by a court reporter, Mrs. Miller stated that on the trip north that evening she noticed that the brakes were pulling to the left. She said she told her father of the brakes when she turned the wheel over to him. She did nothing else about it.

Miss Edelblute, in her pretrial statement, said she noticed nothing wrong with the brakes and heard no mention of them. Otherwise, Miss Edelblute's statement, taken while she was still hospitalized in Altoona, Pennsylvania, is quite

---

[3] Miss Edelblute was also a native of Altoona, Pennsylvania. She had received practical training in pediatric nursing. She was seeking employment in a Savannah hospital, and meanwhile, was living with her friend, Mrs. Miller.

consistent with Mrs. Miller's statement in Savannah, Georgia, as recorded by the reporter.

Each of the plaintiffs in her pretrial statement repeatedly and emphatically said that she was asleep at the time of the accident and had no knowledge of its cause or its circumstances.

In his pretrial deposition, Mr. Laird said that he first saw the borrowed vehicle about 8:00 o'clock in the evening on May 19, 1955, and his testimony, in general, is in agreement with the pretrial statements of his daughter and her friend regarding the trip north and the return to the point of the accident. He testified that, at the time of the accident his wife, his daughter and Miss Edelblute were all asleep. He testified that he had heard of no defect in the brakes and had noticed nothing wrong with them because he had no occasion to use them. He was not attempting to apply the brakes at the time of the accident and did not know what its cause. He testified he noticed no hole in the road, but there may have been one.

Both Mr. and Mrs. Laird suffered substantial injuries in the accident. If someone was liable to respond to them for their damages. Mr. Laird's interest was to testify to facts which would support a claim of liability. He had experience in automobile mechanics, because of which Mrs. Miller said she was particularly anxious to have him test the car she contemplated purchasing. If the brakes had been operating unsatisfactorily, it would be expected that he would have noticed it and could have testified to the fact.

At this point it is appropriate to observe that the pretrial statements of each of the plaintiffs and the pretrial deposition of Mr. Laird showed no basis for any action for damages against the defendant, the owner of the borrowed automobile. There was no claim that the accident was caused by faulty brakes. If there was a defect in the brakes, there was no basis of a claim that the defendant knew of it, or could have found it by a reasonable inspection. There was not even a claim that the use of the vehicle at the time was within the limits of their permissive use of it.

At the trial, however, the plaintiffs undertook to overcome these fatal defects in their legal position. The under-

taking required bald contradiction of their earlier statements.

At the trial, the plaintiffs testified there was not one visit to the defendant's lot, but two. Mrs. Miller testified that on the way to Savannah Beach in the defendant's automobile, she noticed that it pulled to the left each time she applied the brakes. By telephone, she reported the fact to one of the defendants' salesman. She, her father, Miss Edelblute, the other plaintiff, and Mrs. Corine Richardson, in whose home both of the plaintiffs resided, then drove to Savannah and to the defendant's lot. There the defendant's salesman drove the car away, but returned after a short while and redelivered the automobile to her. The salesman reported that the brakes were then all right.

Thus assured, Mrs. Miller testified, she drove her father and her friends back to Savannah Beach, and found that the brakes were working properly. Later, she, her mother, her father and Miss Edelblute again drove to Savannah and on into South Carolina on their tragic journey.

As to the trip to the defendant's lot, the complaint about the brakes and their presumptive repair, Miss Edelblute's testimony was a precise corroboration of Mrs. Miller's. She said that on the trip into Savannah, she noticed the car pulling to the left each time Mrs. Miller applied the brakes.

They did not call as a witness their friend, Mrs. Richardson, who, they said, accompanied them on the trip to have the brakes repaired. Their story of this trip is contradicted by the pretrial deposition of Mrs. Miller's father, for he mentioned no such trip; he never noticed any fault in the operation of the brakes or heard any complaint about them; he never saw the automobile until 8:00 o'clock that evening.[4]

As to the immediate cause of the collision, each plaintiff testified that she was awake at the time, alert and observant. They overtook another vehicle, they said, and Mr. Laird applied the brakes to reduce speed. There was a sudden thump or jerk and the vehicle swerved to the left. Running

[4] The plaintiffs' testimony was also contradicted by the defendant's salesmen, at least one of whom was a friend of Mrs. Richardson's and with whom Mrs. Miller chatted sociably as an acquaintance.

on the left hand shoulder of the road, there was a second thump or jerk. The automobile again careened to the left and crashed into a stump.

They sought to support their theory of causation by the testimony of the manager of a garage in Walterboro to which the wrecked vehicle was removed after the collision. He said the left front wheel was frozen. He saw evidence of an old, slow leakage of fluid which, in his opinion, caused the wheel to lock.

A witness for the defendant testified that he examined the vehicle after its removal to a junk yard in Savannah. The left front wheel would not turn because portions of the bumper had been driven through the tire and held it in place. When the bumper was removed, he said, the wheel turned freely.

As we have noticed, the plaintiffs' testimonial version of the occurrences immediately preceding the collision, was confradicted by their emphatic and repeated declarations in their pretrial statements and by the deposition of the driver, Mr. Laird. It was uncorroborated by Mrs. Laird, the fourth occupant of the automobile. Mrs. Miller did not offer her mother as a witness, and, apparently, no one took her pretrial deposition.

By a court reporter of Savannah, Georgia, and a transcript prepared by him, the defendant offered evidence that Mrs. Miller was interviewed by a Mr. Akrey in the presence of the court reporter on June 17, 1955, and that Akrey's questions at that time and Mrs. Miller's answers were shown by the transcript as prepared by the court reporter and received in evidence. In that transcript, Mrs. Miller is recorded as having said that she returned to work on the preceding Monday. Subsequently, however, Mrs. Miller was again hospitalized and underwent operations for the purpose of rebuilding the bony structure of her nose. In the summer of 1955, she suffered a "nervous breakdown" and was confined for a period in a state hospital in Pennsylvania. She was subjected to electric shock treatments and drugs, which obliterated her memory of the events of the period. For an extended period of time, she was unaware even of the fact that she was the mother of a child and had

been engaged in a contest with her estranged husband over the child's custody. Still later, according to her trial testimony, with psychiatric assistance, her memory of the accident and the events preceding it was restored, but she did not recall having been interviewed by Mr. Akrey in the presence of a court reporter in June 1955. She would not say that she had not been so interviewed, she would only say that she did not remember it, although, at one point, she did say that she did remember that she had been very cooperative.[5]

A Mr. Rock testified that he interviewed Miss Edelblute in the hospital at Altoona, Pennsylvania. One of Miss Edelblute's limbs was in traction,[6] but she was propped up in bed at the time, writing letters. Mr. Rock testified that, after learning from Miss Edelblute what she knew of the accident and the events preceding it, he wrote out a

[5] Mrs. Miller testified:

"What I am remembering is what the psychiatrists have brought back and the things that have been brought up through my series of tests at the State Hospital. I am remembering because they made me remember to get better. I don't remember giving any statement to anybody. I don't remember all this. Apparently the psychiatrist evaded the fact to ask me if I made a statement. I don't know. But I don't remember making any statement. I can't imagine anybody getting that close to me. I have letters from my attorney that I didn't even know what was happening, to December—I don't know—'57 or so. I don't know. I didn't talk with the policeman. I don't remember talking to anybody about this accident, ever. I don't remember talking to anyone until my bills got so heavy I needed an attorney to represent me to get out of the hospital, and I called an attorney to get a release. I don't remember all these operations and everything. I just remember that I got a car. What I testified yesterday, that I went to a Car Lot to buy a car and I went back. Only the things that I had to remember, that I have to remember, why this accident happened and what was causing—what was the cause of the accident, and how seriously we were hurt. I don't know. I can't remember all those things. * * * All I know is I didn't even know I had a son. I just know that I didn't even file for custody of my son until '58. I didn't even remember him."

[6] Miss Edelblute suffered many fractures. Long hospitalization led to other complications, occasioning later hospitalization and operations. Her injuries and those of Mrs. Miller were extremely severe. The injuries of Mr. and Mrs. Laird were less extensive than those suffered by the two plaintiffs; but were substantial.

statement of the information he had obtained from her. Thereafter, Miss Edelblute, in her own handwriting added the words at the end, "I have read and understand the above 3½ pages and they are true to the best of my knowledge," after which she signed herself, "Jeannette M. Edelblute" and placed her initials on each of the three preceding pages.

When, at the trial in July 1961, Miss Edelblute was confronted with the statement of June 23, 1955, she, at first, unequivocally, emphatically and repeatedly identified the signature as hers. She said that the lines immediately preceding her signature appeared to be in her handwriting, as were the initials on each page. After she had been given an opportunity to read and study the entire statement, she said the initials upon the first three pages were not hers. She became uncertain that the lines preceding the signature were in her handwriting, and then denied that they were. She continued to acknowledge that the signature at the end of the statement appeared to be hers, but she contended that she could not have written it upon that particular piece of paper, for, she said, she had not seen that particular piece of paper until it was presented to her at the trial. She also stated that, while hospitalized in Altoona, she was subject to a number of "blackouts," though, otherwise, her medical history, extensively developed in the record, contains no reference to blackouts.

The authenticity of the Miller and Edelblute statements, taken in June 1955, was not impaired by anything that occurred at the trial more than six years later. Mrs. Miller did not remember the interview, but her memory of many events of the period had been obliterated by the medical treatment of her emotional disorder. Miss Edelblute offered no explanation of how her signature could have been affixed to the paper, if she did not put it there. She simply contended that, because the statement was so inconsistent with her trial testimony, she could not have seen it earlier and could not have signed it.

The plaintiffs' trial version of the facts is not only contradicted by the 1955 statements, but the Miller and Edelblute statements of 1955 are stoutly corroborated by the

deposition testimony of Mr. Laird, the driver of the vehicle. The veracity of Mr. Laird's deposition testimony and the content of the Miller and Edelblute statements are supported by Mr. Laird's interest in a recovery of damages for his own injuries and those of his wife, if the true facts would form a basis for the imposition of liability upon the owner of the car. The veracity of the pretrial version of the interested parties of the crucial facts is further supported by the failure of the plaintiffs to call Mrs. Laird and Mrs. Richardson to corroborate their very different trial version of the facts.

Under all of these circumstances, we think that the plaintiffs' trial testimony, as to the crucial facts, so self-serving as it was, but so thoroughly contradicted out of their own mouths and that of the interested father, and completely uncorroborated by witnesses whom they would be expected to produce if there was any truth in their trial testimony, was completely discredited. When the trial judge ignored the compelling contradictions and the absence of available corroboration and made general findings of fact consistent with the plaintiffs' trial version of the occurrences, we think he fell into plain error. On the whole record, the pretrial version of the occurrence, apparently concurred in by all of the injured parties, including the two plaintiffs, was so overwhelmingly established that general findings, based upon the wholly inconsistent and opportunistic trial testimony, must be held to be clearly erroneous. Findings based upon obvious after thoughts, fabricated for the service of the plaintiffs' financial interest in the recovery of large sums of money as damages, should not be allowed to stand.

The judgment of the District Court, based upon its erroneous findings, will be reversed and judgment will be entered for the defendant.

Reversed.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

JUDGMENT C/A No. 6076

MARIE MILLER, *Plaintiff*,

v

EAST GEORGIA MOTORS, INC., A CORPORATION, *Defendant*.

The United States Court of Appeals for the Fourth Circuit having on the 22nd day of June, 1962, ordered that the judgment appealed from be reversed with costs; and that the above entitled cause be remanded, with direction to enter judgment for the defendant,

THEREFORE ON CONSIDERATION THEREOF, and pursuant to Rule 58 of the Federal Rules of Civil Procedure, it is now here ordered and adjudged that the Plaintiff take nothing by her complaint.

ERNEST L. ALLEN,
C. D. C. U. S., E. D. S. C. (Seal.)

Charleston, South Carolina, June 26, 1962.

JUDGMENT OF THE U. S. DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

JUDGE WYCHE'S ORDER

The above cases were consolidated for trial and tried before me without a jury.

Both actions are for personal injuries sustained by the plaintiff Marie Miller and by the plaintiff Jeanette M. Edelblute on or about April 20, 1955, while riding in a 1950 used Ford automobile, the property of the defendant, when the automobile was involved in an accident on U. S. Higway Number 17A in Colleton County, South Carolina.

Vincent Berry, a disinterested expert witness, Service Department Manager of many years' experience at the Walterboro Motor Sales Company at Walterboro, South Carolina, the Ford dealer there, assisted in removing the Ford automobile from the ditch where the accident happened. The automobile was carried to Yemassee, South Carolina, a short distance, by a wrecker, and shortly thereafter was brought to the Walterboro Motor Sales Company where he inspected the left front wheel about a week or so after the accident and found it locked or frozen with oil or grease on the outside of the brake drum and wheel hub which in his opinion had come from the inside. It was his expert opinion that the brake had frozen inside the wheel drum caused by oil or grease leaking therein.

In compliance with Rule 52(a) Rules of Civil Procedure, I find the facts specially and state my conclusions of law thereon, in the above causes, as follows:

FINDINGS OF FACT

1. The defendant is a used car dealer in Savannah, Georgia, and was the owner of the 1950 used Ford automobile in which the plaintiff Marie Miller and the plaintiff Jeanette M. Edelblute were riding at the time of the accident.

2. On or about April 20, 1955, the defendant turned over its used 1950 Ford automobile to the plaintiff Marie Miller for demonstration purposes to drive and test, and to have driven and tested, with a view toward the sale of the automo-

bile to the plaintiff Marie Miller, and for the purpose of determining whether or not the plaintiff Marie Miller would purchase it; that in order to better decide whether to purchase the said automobile the plaintiff Marie Miller permitted the same to be driven and operated by her stepfather Earl Laird, upon whose advice and judgment she relied, all with the actual or tacit consent of the defendant and in conformity with the habitual business custom and practice of the defendant.

3. On April 20, 1955, while the used 1950 Ford automobile was being demonstrated and tested, as aforesaid, and while it was being driven and operated by Earl Laird, stepfather of the plaintiff Marie Miller, for said purposes, on U. S. 17A in Colleton County, South Carolina, and in the direction of Savannah, Georgia, with the plaintiff Marie Miller and the plaintiff Jeanette M. Edelblute riding as passengers therein, the brakes of the automobile suddenly stuck, locked, froze or engaged and took hold to such an extent that the driver lost control of the same, causing the automobile to suddenly go off the highway to the left side of the highway and collide with a stump of a tree, and caused the plaintiff Marie Miller and the plaintiff Jeanette M. Edelblute to suffer severe and permanent injuries and to incur doctors' and hospital bills.

4. The latent defects of the braking mechanism of the used 1950 Ford automobile were known to the defendant at the time the said automobile was turned over to the plaintiff Marie Miller, or by a proper and reasonable inspection should have been known to the defendant.

5. The plaintiff Marie Miller has suffered permanent injuries, hospital and doctors' bills in the sum of TWENTY FIVE THOUSAND ($25,000.00) DOLLARS, actual damages.

6. The plaintiff Jeanette M. Edelblute has suffered permanent injuries, hospital and doctors' bills in the sum of THIRTY SEVEN THOUSAND; FIVE HUNDRED ($37,500.00) DOLLARS, actual damages.

Conclusions of Law

1. This court has jurisdiction of these actions upon the grounds of diversity of citizenship and jurisdictional amounts involved.

2. The defendant corporation was the owner of the used 1950 Ford automobile in which the plaintiff Marie Miller and the plaintiff Jeanette M. Edelblute were riding at the time of the accident.

3. The relationship of bailor and bailee between the plaintiff Marie Miller and the defendant East Georgia Motors, Inc. was entered into in the State of Georgia.

4. The defendant was negligent in turning over the 1950 used Ford automobile for demonstration purposes, as aforesaid, when its braking mechanism was defective, as aforesaid, before making a reasonable and proper inspection of the same; in not repairing the braking mechanism of the automobile prior to permitting the same to be driven for demonstration purposes; in allowing the automobile to be driven for demonstration purposes when in the exercise of due and ordinary care the defendant should have known that the braking mechanism thereof was defective; in failing and refusing to warn plaintiff Marie Miller of said defective braking mechanism; in informing plaintiff Marie Miller that said automobile was a safe one in which to ride whereas in fact it was a dangerous instrumentality such that to ride therein was dangerous and perilous; in not properly and adequately inspecting the braking mechanism of said automobile prior to permitting it to be driven for the purposes herein stated.

5. The said acts of negligence were the direct and proximate cause of plaintiff Marie Miller's and plaintiff Jeanette M. Edelblute's injuries and damages.

6. The plaintiff Marie Miller had no knowledge of the defect in the automobile turned over to her by the defendant upon the representation that it was free of any defects and plaintiff Marie Miller assumed no risk in driving or riding in the said vehicle.

7. Plaintiff Marie Miller was not guilty of contributory

negligence or contributory wilfulness as a proximate cause of her injuries and damages.

8. Plaintiff Marie Miller is entitled to judgment against the defendant for actual damages for permanent injuries, hospital and doctors' bills in the amount of TWENTY FIVE THOUSAND ($25,000.00) DOLLARS.

9. Plaintiff Jeanette M. Edelblute is entitled to judgment against the defendant for actual damages, for permanent injuries and hospital and doctors' bills, in the amount of THIRTY SEVEN THOUSAND, FIVE HUNDRED ($37,500.00) DOLLARS.

ORDER

It is, therefore, ORDERED, That the Plaintiff Marie Miller have judgment against the defendant East Georgia Motors, Inc. in the sum of TWENTY FIVE THOUSAND ($25,000.00) DOLLARS, actual damages; and that the plaintiff Jeanette M. Edelblute have judgment against the defendant East Georgia Motors, Inc., in the sum of THIRTY SEVEN THOUSAND, FIVE HUNDRED ($37,500.00) DOLLARS, actual damages.

C. C. WYCHE,
United States District Judge.
(Sitting by designation)

Dated: Spartanburg, South Carolina, September 1, 1961.

(4126-9)

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 9 1962
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

October Term, 1962

No. 505

MARIE MILLER AND JEANETTE M. EDELBLUTE,
Petitioners,

v.

EAST GEORGIA MOTORS, INC.,
A CORPORATION,
Respondent.

BRIEF IN REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

B. ALLSTON MOORE, JR.
HAROLD A. MOUZON
Attorneys for Respondent

MOORE & MOUZON
4 Gillon Street
Charleston, S. C.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	1
ARGUMENT	2
I. Should the Court of Appeals Have Directed That Judgment Be Entered for Respondent Instead of Merely Ordering a New Trial?	2
II. Had the Respondent Waived Any Errors of Law or Fact or Findings of the Trial Court by Its Failure to Make Any Motions Before the Trial Court?	4
III. Did the Court of Appeals Have Authority to Consider an Appeal on Its Merits and to Reverse the Decision of the Trial Court Where the Sole Question Involved Is the Credibility of Witnesses?	6
IV. Were the Trial Court's Decision on the Credibility of Witnesses and Its Findings of Fact Clearly Erroneous?	8
CONCLUSION	10

TABLE OF CASES

Freightways, Inc. v. Stafford, 8 Cir., 217 F. 2d 831	6
Morris v. Prefabrication Eng. Co., 5 Cir., 160 F. 2d 779	5
Sanders v. Leech, 5 Cir., 158 F. 2d 486	7
Stewart v. Southern Ry. Co., 315 U. S. 283, 62 S. Ct. 616, 86 L. Ed. 849	2
U. S. v. Lowenthal, 7 Cir., 248 F. 2d 397	5

In the

Supreme Court of the United States

October Term, 1962

No. 505

MARIE MILLER AND JEANETTE M. EDELBLUTE,
Petitioners,

v.

EAST GEORGIA MOTORS, INC.,
A CORPORATION,
Respondent.

BRIEF IN REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

QUESTIONS PRESENTED

We agree that the petition properly states the questions discussed therein, though we do not of course agree that these questions should be reviewed by this Court.

STATEMENT OF THE CASE

We are willing to accept the Statement of the Case in the petition so far as it deals with matters preceding the trial in the District Court. We cannot agree with the statement as to some of the testimony at the trial.

We cannot agree that the respondent offered no explanation as to why the petitioners' automobile ran off the highway. While we could offer no direct testimony that the driver, Mr. Laird, fell asleep, we did argue that this was a reasonable conclusion from the testimony.

We cannot agree with the statement on page 6 of the petition that the witness Berry "testified as to facts within his observance, of oil or grease on the lefthand brake." On the contrary, Berry said that he did not remove the wheel and could not positively say that there was anything on the brake.

We cannot agree with the statement on page 7 of the petition that the statements made by Mrs. Miller and Miss Edelblute were taken while they were under narcotics and in shock. The evidence is to the contrary.

We emphatically disagree with the final paragraph on page 6 of the petition as far as it reflects upon the decision of the Court of Appeals. We refer to the opinion of that Court for a correct "Statement of the Case."

ARGUMENT

I.

Should the Court of Appeals Have Directed That Judgment Be Entered for Respondent Instead of Merely Ordering a New Trial?

The petitioners assign no reasons why a writ of certiorari should be granted in this case except the general charge that the decision of the Court of Appeals in "a far departure from the accepted and usual course of judicial proceedings" and that it is in conflict with the decision of this Court in *Stewart* v. *Southern Railway Co.*, 315 U. S. 283, 62 S. Ct. 616, 86 L. Ed. 849. Petitioners contend that under this

decision the Court of Appeals, even if it reversed the District Court, should have ordered a new trial instead of directing the entry of judgment for the defendant.

We cannot agree. The situation with which the Court dealt in the *Stewart* case was very different from that in the present case. Stewart died as a result of his arm's being caught and crushed in the coupling between two cars. The Federal Safety Appliance Act required an automatic coupler which could be operated without going between the cars. A foreman testified that after the accident and after attempting to work the automatic coupler he went between the cars and worked the coupler by hand. The opinion went on to say:

> "He was not asked, and did not state, what effort he made to operate the pin lifter. Neither party asked him any further questions as to the working conditions of the pin lifter or coupler.
>
> "The petitioner insists that, in the absence of evidence on behalf of the respondent as to the condition of the coupler, the jury were entitled to infer that the pin lifter was not in working order, otherwise the foreman, an experienced man, would not have gone between the cars and opened the coupler jaw by hand. The court below held the jury was not entitled to draw this inference in the absence of testimony by the foreman with respect to his efforts to use the pin lifter and as to its condition.
>
> "We hold that on this record, neither party is entitled to prevail. If the issue as to the condition of the coupler mechanism was determinative, a new trial should have been ordered so that this issue might have been resolved in the light of a full examination of the foreman, the witness who could have given further testimony on the subject.
>
> "The judgment must be reversed and the cause remanded to the court below for further proceedings."

In other words, a new trial was ordered because the court was of the opinion that there was a lack of evidence upon a vital issue, determinative of the case. Certainly that is not the situation in the present case.

There is nothing in th opinion of the Court of Appeals to support the suggestion in the petition (p. 9) that the Court regarded the petitioner's failure to call Mrs. Laird and Mrs. Richardson as "determinative" of the case. The Court was merely applying the well-recognized rule:

> "It is well settled that if a party fails to produce the testimony of an available witness on a material issue in the cause, it may be inferred that his testimony, if presented, would be adverse to the party who fails to call the witness." (20 Am. Jur. 182)

It would be rather unreasonable to permit a party to fail to call an apparently available witness on a material issue, without any explanation of such failure, and then to maintain that he is entitled to a new trial because the trial court commented upon the absence of the witness. Yet this appears to be the contention of the petitioners here. There was ample evidence to justify the Court of Appeals in directing entry of judgment for the defendant without any reference to the plaintiffs' failure to produce all available witnesses.

II.

Had the Respondent Waived Any Errors of Law or Fact or Findings of the Trial Court by Its Failure to Make Any Motions Before the Trial Court?

We are somewhat surprised that the petitioners should now attempt to raise this question. They served notice of a motion in the Court of Appeals to dismiss our appeal on

behalf of the respondent upon the ground that we had "at no time presented to the District Court any Motion for a directed verdict or for a new trial or for a judgment notwithstanding the verdict." The motion was noticed for hearing when the appeal was set for hearing on the merits in the Court of Appeals; but, although petitioners had devoted a large part of their brief to arguing the motion to dismiss, they did not so much as mention the motion in oral argument. The Court of Appeals did not refer to the motion in their *per curiam* opinion.

It appears to us that the discussion of this question on pages 9-12 of the petition ignores the fact that the case was tried in the District Court by a judge, without a jury. There was not and could not be a verdict, directed or otherwise, nor could there be a judgment notwithstanding a non-existent verdict. If authority be needed for what would seem to be self-evident, we call attention to *U. S.* v. *Lowenthal*, 7 Cir., 248 F. 2d 397, 398, where it was said:

> "Rule 50 of the Federal Rules of Civil Procedure applies to trials by jury only and a motion for a directed verdict is not applicable to nor proper in a non-jury trial. *Morris* v. *Prefabrication Engineering Co.*, 5 Cir., 1947, 160 F. (2d) 779."

In the latter case the Court said:

> "The point was specially and fully made in the motions for directed verdict and for judgment non obstante. We do not regard these motions, under the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, as being necessary or even proper where there is not a jury trial. * * *"

Likewise it was held in *Freightways, Inc.* v. *Stafford*, 8 Cir., 217 F. 2d 831, 837:

> "It is, however, contended by plaintiffs that the defendants cannot urge either the question of the irreconcilable conflict in the findings or the insufficiency of the evidence to sustain the judgments because they did not move in the trial court to modify or amend the findings nor for a new trial on the ground of insufficiency of the evidence to sustain the findings or the judgments. This contention, we think, is unsound. The case was not tried to a jury but to the Court. The rule as to the prerequisites to a review in such a case is well stated in Simkins Federal Practice, Third Edition, Section 648, as follows:
>
> > " 'When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made, in the District Court, an objection to such findings, or has made motion to amend them, or a motion for judgment.' "

The fact that the rule credited to Simkins is quoted verbatim from Rule 52(b) of the Rules of Civil Procedure does not lessen its authority.

III.

Did the Court of Appeals Have Authority to Consider an Appeal on Its Merits and to Reverse the Decision of the Trial Court Where the Sole Question Involved Is the Credibility of Witnesses?

Petitioners apparently contend that the Court of Appeals is without authority to consider the credibility of witnesses

or to question the views of the trial court as to their credibility. Such is not the rule. Rule 52(a) requires only that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

It seems to us that the matter is fairly state in *Sanders* v. *Leech*, 5 Cir., 158 F. 2d 486, 487:

> "Under that rule (52a) as it plainly reads and has been interpreted by the courts, it is not for the appellate court to substitute its judgment on disputed issues of fact for that if the trial court where there if substantial credible evidence to support the finding. It may reverse, though, under the rule (1) where the findings are without substantial evidence to support them; (2) where the court misapprehended the effect of the evidence; and (3) if, though there is evidence which if credible would be substantial, the force and effect of the testimony considered as a whole convinces them that the finding is so against the great preponderance of the credible testimony that it does not reflect or represent the truth and right of the case."

In the present case the Court of Appeals were obviously and strongly of the opinion that the findings of the trial court were not supported by any credible testimony. The *per curiam* opinion says:

> "Under all of these circumstances, we think that the plaintiffs' trial testimony, as to the crucial facts, so self-serving as it was, but so thoroughly contradicted out of their own mouths and that of the interested father and completely uncorroborated by witnesses whom they would be expected to produce if there was any truth in their trial testimony, was completely discredited. * * * On the whole record, the pretrial version of the occurrence, apparently concurred in by all of the injured parties, including the two plaintiffs, was

so overwhelmingly established that general findings, based upon the wholly inconsistent and opportunistic trial testimony, must be held to be clearly erroneous. Findings based upon obvious after thoughts, fabricated for the service of the plaintiffs' financial interest in the recovery of large sums of money as damages, should not be allowed to stand."

It is shocking to contend that the Court of Appeals was without power to do justice in such a situation.

IV.

Were the Trial Court's Decision on the Credibility of Witnesses and Its Findings of Fact Clearly Erroneous?

In their discussion of this question (Petition, pp. 14-24), petitioners clearly recognize that the vital point in the case is the credibility of petitioners' testimony at the trial as compared to their statements made shortly after the accident and introduced in evidence.

We do not think it necessary to discuss the testimony at any length, because it is fairly and succinctly analyzed by the Court of Appeals in their opinion. We content ourselves with pointing out some of the inconsistencies and inaccuracies in petitioners' argument.

They say, "The trial judge, who had the opportunity to observe not only petitioners when they testified, but also the demeanor of those whose testimony formed the basis for the introduction of the pretrial statements, rejected the pretrial statements." The surprising fact is that the trial judge did not reject the pretrial statements, except by inference. His opinion did not even mention these statements and their contradiction of the petitioners' oral testimony, though this was obviously a vital fact, if not the controlling fact in the case. The trial judge did not so much pass upon the credi-

bility of the witnesses as he did ignore the fact that the witnesses' pretrial statements made their credibility questionable.

There are several inaccuracies in petitioners' remarks about the pretrial statements. We mention only an example or two. They complain (Petition, p. 14) that their counsel was not present when the statements were taken. This was long before the petitioners commenced their actions and, so far as the record shows, long before they retained counsel. Again petitioners assert (Petition, p. 16) that at the time the Edelblute statement was taken she testified that she "suffered day long blackouts on account of her cerebral concussion and was under deep sedation," and that her jaws were wired so that she could not talk until mid-July. And yet the petitioners put in the deposition of Dr. Hull, Miss Edelblute's doctor, who did not mention blackouts or sedation, and the deposition of her dental surgeon, who said that the wires were removed nine days before her statement was taken and that then "the fracture was in proper alignment and patient was back to regular eating habits."

Petitioners explain away their failure to call Mrs. Laird and Mrs. Richardson to testify by saying:

> "Petitioners' counsel never head of the pretrial statements until the trial. Why should they go to the expense of having Mrs. Laird and Mrs. Richardson present to testify cumulatively to what petitioners would assert?"

The answer is that the deposition of Mr. Laird, the driver of the automobile, had been taken long, long before the trial and had flatly contradicted the stories which petitioners were to tell at the trial. They complain that the Court of Appeals was "overawed" by the Laird deposition, because he was testifying contrary to his financial interest. Then

they proceed to explain away the deposition by a reckless and baseless, if not libelous, suggestion:

> "The record does not show whether respondent has paid Mr. Laird — or Mrs. Laird, too, for that matter — and taken their general release. Or perhaps Mr. Laird and respondent had the same insurer whose common interest was in showing that the brakes were not defective and that Mr. Laird admitted no fault in the operation of the vehicle."

Perhaps a simpler explanation of Mr. Laird's testimony is that he is an honest man. At any rate, petitioners' counsel who cross-examined him did not see fit to question him as to any fraudulent conspiracy with the insurance company.

We submit that petitioners have entirely failed to show that the Court of Appeals was not amply justified in holding that the findings of the trial judge were clearly erroneous.

CONCLUSION

There are no valid grounds for granting a writ of certiorari in this case and the petition should be denied.

Respectfully submitted,

B. Allston Moore, Jr.
Harold A. Mouzon
Attorneys for Respondent

Moore & Mouzon
4 Gillon Street
Charleston, S. C.